



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 5, 1997

Mr. William S. Nail
General Counsel
Employees Retirement System of Texas
18th and Brazos Street
P. O. Box 13207
Austin, Texas 78711-3207

OR97-0267

Dear Mr. Nail:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103435.

The Employees Retirement System of Texas (the "system") received a request for "a copy of the 1994 winning proposal in the bid for the claims administration audit of the administrator's operations under the Texas Employees Uniform Group Insurance Program." You contend that the portions of the requested information are considered to be proprietary information by Wolcott & Associates, Inc., ("Wolcott"), which submitted the "1994 winning proposal." You ask whether the submitted information from Wolcott's proposal is excepted from disclosure under section 552.110 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Pursuant to section 552.305, we notified Wolcott of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. Wolcott responded, summarily arguing that "we have always taken the position that our proposals are proprietary information."¹ Alternatively, in their submitted brief, Wolcott asserts a trade secret claim for the "work plan used to conduct audits for self-funded health care plans such as the one provided by [the system]."

¹We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the commercial or financial information prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

The system has not argued that releasing the requested information will impair the government's ability to obtain necessary information in the future. *See, e.g., Bangor Hydro-Elec. Co. v. United States Dep't of the Interior*, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because "it is in the [submitter's] best interest to continue to supply as much information as possible"); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"). Therefore, the system may not withhold the submitted information under the second prong of section 552.110. Additionally, we note that the system does not claim that its own proprietary interests are at issue for the requested information; rather, the system claims section 552.110 on behalf of Wolcott. As Wolcott did not argue the "commercial or financial information" prong of section 552.110 for the submitted information, we conclude that the information may not be withheld under this prong.

We next consider Wolcott's claim that the requested records are trade secret. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information
which is used in one's business, and which gives him an opportunity
to obtain an advantage over competitors who do not know or use it.

It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. This office cannot conclude that information is a trade secret unless the governmental body or third-party has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). In its brief to this office, Wolcott has addressed each of the six trade secret factors regarding its proposal submitted to the system. We agree that portions of the submitted "work plan" which we have marked constitute the type of information protected by the trade secret prong of section 552.110. Therefore, we conclude that the marked information in the submitted proposal may be withheld pursuant to section 552.110; however, the remaining information may not be withheld pursuant to this exception and should be released.

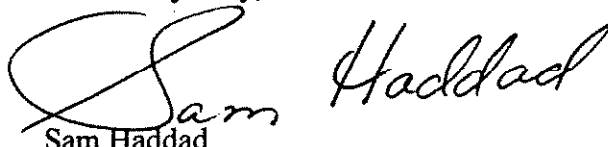
²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Sam Haddad". The signature is written in black ink and is positioned above the printed name.

Sam Haddad

Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 103435

Enclosures: Marked documents

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